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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1042

LOUISIANA POWER & LIGHT COMPANY,
Petitioner,

versus

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE
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LOUISIANA POWER & LIGHT COMPANY,
Petitioner,

versus

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Louisiana Power & Light Company, through undersigned counsel, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on October 30, 1962.

OPINIONS BELOW

The original opinion of the Court of Appeals, which is officially reported at 309 F. 2d 181, appears at Appendix A, *infra*, pp. 22-26. Rehearing was denied without opinion

on February 27, 1963. The opinion of the District Court, which is unreported, appears at Appendix B, *infra*, pp. 27-29.

JURISDICTION

The judgment of the Court of Appeals was entered on October 30, 1962. A timely petition for rehearing filed on November 16, 1962 was denied on February 27, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does the Federal Declaratory Judgments Act confer discretion on the Federal District Court rather than an absolute right upon a litigant?

2. Can a litigant use the Federal Declaratory Judgments Act to institute a declaratory judgment action in the Federal District Court to raise a claim of federal right under the Federal Arbitration Act[1] in defense to a pending State Court action in which the litigant is a defendant?

3. Can a litigant use the Federal Declaratory Judg-

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[1]The Federal Arbitration Act (Act of July 30, 1947, c. 392, 61 Stat. 669, as amended, 9 U.S.C. §1 *et seq.*) is only applicable where the agreement to arbitrate is contained in a written contract "evidencing a transaction involving commerce". *Bernhardt v. Polygraphic Co. of America*, 350 U. S. 198 (1956); *Johnson, Inc. v. 2500 Wisconsin Avenue, Inc.*, 231 F. 2d 761 (D. C. Cir. 1956). Therefore, there is also presented here the subordinate question: Are the provisions of the Federal Arbitration Act applicable to a contract between the parties which by its very terms limits the scope to the territory of the State of Louisiana? See Article II of Joint Use Agreement (Exhibit 1) printed in Appendix D, *infra*, p. 34.

ments Act as an instrument to obtain a choice of forum or change of tribunal?

4. When a State District Court, which has jurisdiction over the parties and subject matter, has rendered a judgment, affirmed by the State Court of Appeal and certiorari denied by the State Supreme Court, does the Federal District Court have jurisdiction to entertain a declaratory judgment action involving the same parties and subject matter to redeclare, review, or set aside the judgment of the State District Court?

5. When federal jurisdiction is based upon diversity of citizenship, do the *Erie-Tompkins* doctrine and principles of comity require the Federal Courts sitting in the State to give the same recognition and effect to the State Court judgment as the State Courts would give it?

6. Where the issue in dispute between the parties involves arbitration and has been determined in State Court proceedings, does the judicial policy against relitigation of issues preclude relitigation of the merits of the issue in a subsequent proceeding in Federal District Court?

7. Where the issue in dispute between the parties involves arbitration and has been determined in State Court proceedings, does the doctrine of *res judicata* or collateral estoppel bar a subsequent proceeding in Federal District Court on the same issue?

STATUTES INVOLVED

The statutory provisions involved are Act of June 25, 1948, c. 646, 62 Stat. 964, as amended, 28 U.S.C. §§ 2201 and 2202; Rule 57 of the Federal Rules of Civil Procedure; Act of June 25, 1948, c. 646, 62 Stat. 968, 28 U.S.C. § 2283; Act of July 30, 1947, c. 392, 61 Stat. 669, as amended, 9 U.S.C. §§ 1, 2, 3, and 4. These statutory provisions are printed in Appendix C, *infra*, pp. 29-33.

STATEMENT OF THE CASE

Since 1929 Louisiana Power & Light Company has had in effect with Southern Bell Telephone & Telegraph Company a "Joint Use Agreement" covering the joint use of all wood poles that belong to each of the parties and are located in the rural areas of Louisiana.

One feature of the Joint Use Agreement is the provision whereby each party shall indemnify and hold harmless the other party from damages for injuries to the former's employees arising out of the joint use of poles or due to the proximity of attachments thereto.[2] Another feature is the provision for arbitration of any differences between the parties which arise in connection with the administration of the Joint Use Agreement.[3]

On or about August 17, 1959, an employee of the Telephone Company was electrocuted while performing work

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[2]See Article XIII of the Joint Use Agreement (Exhibit 1) printed in Appendix D, *infra*, p. 35.

[3]See Article XVIII of the Joint Use Agreement (Exhibit 1) printed in Appendix D, *infra*, p. 35.

in the course of his employment on a pole covered by the Joint Use Agreement.

On July 1, 1960 the survivors of the deceased employee instituted a tort suit in the State District Court sitting in Washington Parish, Louisiana, against the Power Company. The Power Company filed an answer to the suit and brought the Telephone Company into the State Court proceedings as a third party defendant for the purpose of demanding indemnification from the Telephone Company on the basis, among others, of the indemnity provision contained in the Joint Use Agreement between the Power Company and the Telephone Company.

The Telephone Company, in responding to the third party action in the State Court proceedings, filed various exceptions which primarily raised the issue of whether the dispute under the indemnity provision of the Joint Use Agreement between the parties was arbitrable under the arbitration provision of the Joint Use Agreement. The Telephone Company subsequently filed a motion for stay of the third party petition in the State Court proceedings, demanding arbitration of the dispute under the indemnity provision of the Joint Use Agreement. The Telephone Company's motion for stay was based upon the Louisiana Arbitration Act[4] which provides relief identical to that provided by the Federal Arbitration Act.[5]

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[4]Louisiana Revised Statutes of 1950, Title 9, Sections 4201, *et seq.*, printed in Appendix E, *infra*, pp. 36-38.

[5]The Telephone Company did not raise its defense under the Federal Arbitration Act in the State Court proceedings, although the Act is equally applicable and enforceable in the State or Federal Courts. *Robert Lawrence Co., v. Devonshire Fabrics, Inc.*, 271 F. 2d 402 (CA-2, 1959).

The State Court specifically ruled on the issue and controversy raised by the Telephone Company, holding that Article XIII (the indemnification provision) of the Joint Use Agreement "creates a substantive right in favor of Louisiana Power [& Light Company]," and that Article XVIII (the arbitration provision) "deals only with the administration of the agreement, which is of course procedural by nature."[6] The Telephone Company filed an appeal from this decision by the State Court to the Court of Appeal, First Circuit, State of Louisiana. The State Appellate Court affirmed the State District Court judgment, denying the Telephone Company's motion for stay pending arbitration, and stating that "the ruling of the District Court is correct." The Telephone Company then applied for writs to the Louisiana State Supreme Court, which refused to overrule the State Court judgment as affirmed by the Court of Appeal. The Louisiana State Supreme Court stated simply: "Relator has a remedy *by appeal* in the event of an adverse judgment on the merits." (Emphasis added).

With the State Court proceedings pending in the posture as noted above, the Telephone Company then filed in the Federal District Court a declaratory judgment action pursuant to the Federal Declaratory Judgments Act and Rule 57 of the Federal Rules of Civil Procedure, claiming a right under the Federal Arbitration Act and demanding an injunction to stay, in effect, the State Court proceedings. Jurisdiction was invoked on the ground of diversity of citizenship between the parties, the plaintiff being a New York corporation, having its principal place of business in the

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[6] See pertinent portions of Reasons for Judgment by the State Court sitting in Washington Parish, Louisiana (Exhibit A) printed in Appendix F, *infra*, pp. 39-40.

State of Georgia, and the defendant being a Florida corporation, having its principal place of business in the State of Louisiana, and the amount of the controversy exceeds $10,000.00.[7]

The Telephone Company by its declaratory judgment action seeks to raise in the Federal District Court the same issue that was decided against it in the State Court proceedings, viz., the arbitrability of the dispute between the parties under the Joint Use Agreement. (See, Prayer of Respondent's petition, R. 13-14.)

The Power Company, in response to the Telephone Company's declaratory action in the Federal District Court below, filed a motion to dismiss interposing the pendency of the State Court proceedings and the prior judgment therein against the Telephone Company on the very issue being raised collaterally in the Federal District Court. The Federal District Court heard argument upon the issues raised in the Power Company's motion to dismiss and the Court (through Judge J. Skelly Wright) entered an order dis-

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[7]See *Bernhardt v. Polygraphic Co. of America*, 350 U. S. 198 (1956); see also *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F. 2d 402 at 409 (CA-2, 1959), wherein it is stated: "We, therefore, hold that the Arbitration Act in making agreements to arbitrate 'valid, irrevocable, and enforceable' created national substantive law clearly constitutional under the maritime and commerce powers of the Congress and that the rights thus created are to be adjudicated by the federal courts *whenever such courts have subject matter jurisdiction, including diversity cases, just as the federal courts adjudicate controversies affecting other substantive rights when subject matter jurisdiction over the litigation exists.*" (Emphasis added). It should be noted that the organ of the Court of Appeals in the instant case mistakenly cited the Federal Arbitration Act as a basis for jurisdiction at footnote 1 of the opinion. See Appendix A, *infra*, at p. 23. But the Federal Arbitration Act is not a proper basis for jurisdiction, as noted above in the *Bernhardt* and *Lawrence* opinions.

missing the Telephone Company's declaratory judgment action for the reasons quoted in part below:

> "[A] serious doubt arises whether the Federal Arbitration Act is applicable. See 9 U.S.C. §§ 1, 2; *Bernhardt v. Polygraphic Co.*, 350 U. S. 198.
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> * * * *
>
> "Nor is the case for intervention by this Court much better if the Federal Arbitration Act governs the issue tendered. For state courts are equally bound to enforce the federal right when it is operative, see *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 2 Cir., 271 F. 2d 402, 407, cert. granted, 362 U. S. 909, dismissed by stipulation, 364 U. S. 801; *Metro Industrial Painting Corp. v. Terminal Const. Co.*, 2 Cir., 287 F. 2d 382, 386, (concurring opinion of Lumbard, C. J.), and the applicant here cannot be heard to complain because he neglected to plead the Act in the proceedings pending there.
>
> "In any event, even if there is no absolute bar to the present action, see *Rooker v. Fidelity Trust Co.*, 263 U. S. 413; *Clothing Workers v. Richman Bros.*, 348 U. S. 511; 28 U.S.C. §2283, the policy against relitigation of issues and principles of comity strongly counsel restraint in the exercise of a discretionary jurisdiction, invoked so late, to halt state court proceedings in order to enforce a ques-

tionable federal right to arbitration See *Fremont Cake & Meal Co. v. Wilson & Co.*, 8 Cir., 183 F. 2d 57, 59-60; see also, *Manufacturers Record Publishing Company v. Lauer*, E. D. La., 169 F. Supp. 234, affirmed, 5 Cir., 268 F. 2d 187."

The Telephone Company appealed this judgment to the United States Court of Appeals for the Fifth Circuit and on October 30, 1962, that Court reversed and remanded the cause to the Federal District Court, ordering the District Court to retain jurisdiction of the declaratory judgment action.

The gravamen of the holdings of the Court of Appeals with which petitioner disagrees may be stated briefly as follows:

FIRST HOLDING—The pendency of the State Court proceedings between the parties involving the same subject matter does not in any way interfere with the jurisdiction of the Federal District Court to entertain the Telephone Company's declaratory judgment action seeking to raise a federal right in defense to the action pending against it in State Court, and dismissal of such declaratory judgment action by the Federal District Court was improper.

SECOND HOLDING—The Telephone Company has the right to a decision of the declaratory judgment issue and is entitled to pursue that right in the forum of its choice.

THIRD HOLDING—The judicial policy against relitigation of issues between the parties is not before the Court.

As to these holdings, petitioner submits, the Court of Appeals was in error and in conflict, directly, and in principle, with decisions of this Court and several of the Courts of Appeal.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals is in direct conflict with the decision of this Court in *Public Service Commission of Utah v. Wycoff Co.*, 344 U. S. 237 (1952) and the recent decisions of the Court of Appeals for the Second Circuit in *National Cancer Hospital of America v. Webster*, 251 F. 2d 466 (CA-2, 1958) and the Court of Appeals for the Ninth Circuit in *Shell Oil Company v. Frusetta*, 290 F. 2d 689 (CA-9, 1961). This conflict raises serious questions regarding the object of the Federal Declaratory Judgments Act which are of fundamental importance to the proper function of the Federal Judiciary and the proper administration of Federal practice and procedures.

It is a general principle of law that the Federal Declaratory Judgment Act confers discretion on the courts rather than an absolute right upon the litigant, and the proper exercise of that discretion by Federal Courts requires dismissal of a declaratory judgment action which sets forth a claim of a federal right in defense to a pending State Court action. In the case of *Public Service Commission of Utah v. Wycoff Co.*, this Court said:

> "In this case, as in many actions for declaratory judgment, the realistic position of the parties is

reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts.

* * * *

"This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigation from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." 344 U. S. 237, 248 (1952).*

It is neither the intent nor purpose of the Declaratory Judgments Act to permit a litigant to secure a choice of forum or to accomplish what could not be accomplished under the Removal Act. Judge Learned Hand of the Court of Appeals for the Second Circuit stated in his opinion in *National Cancer Hospital of America v. Webster*, 251 F. 2d. 466 at 467-68 (CA-2, 1958):

"The prayer for declaratory judgment that all the assets in the possession of the defendant are property of the plaintiff depends upon § 400 of Title 28 U.S.C. [now 28 U.S.C.A. §§ 2201, 2202] which has for its progenitor the old bill in equity to 'quiet title' or the bill *quia timet*, and, like these, it

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*Recently followed in *Lebowich v. O'Connor*, 309 F. 2d 111, 112-13 (CA-2, 1962).

lies in the court's discretion whether to entertain it. As Judge Parker well said in *Aetna Casualty & Surety Co. v. Quarles*, 4 Cir., 92 F. 2d 321, 324, the discretion 'should not be exercised for the purpose of trying issues involved in cases already pending, especially where they can be tried with equal facility in such cases or for the purpose of anticipating the trial of an issue in a court of co-ordinate jurisdiction. The object of the statute is to afford a new form of relief where needed, not to furnish a new choice of tribunals or to draw into federal courts the adjudication of causes properly cognizable by courts of the states."

In *Shell Oil Company v. Frusetta*, 290 F.2d 689, at 691-92 (CA-9, 1961) the Court of Appeals for the Ninth Circuit held:

"We believe the district court acted with sound discretion in dismissing the action. It is well established that even though jurisdiction may exist under the Declaratory Judgment Act the granting of declaratory judgments is at the discretion of the district court. *Brillhart v. Excess Insurance Co.*, 1942, 316 U. S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620; *Maryland Casualty Co. v. Boyle Construction Co.*, 4 Cir., 1941, 123 F. 2d 558. Said discretion is to be exercised in accordance with sound judicial principles and the purposes of the Declaratory Judgment Act.

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> "It is not the purpose of the Declaratory Judgment Act to encourage a race to the courthouse for the purpose of transferring litigation to the federal courts from the state courts."

The decision of the Court of Appeals in the instant case not only directly conflicts with the above holdings but seriously departs from the purpose and function of the Federal Declaratory Judgments Act and Rule 57 of the Federal Rules of Civil Procedure. If the Court of Appeals is correct in this case, its decision effectively destroys the purpose of the Declaratory Judgments Act, and abolishes the District Court's discretion in this regard. Petitioner urges that this conflict poses an important and vital question as to the proper administration and function of the Federal Judiciary throughout the United States, and clarification by this Court is needed.

II.

Another panel of the Court of Appeals for the Fifth Circuit, in the case of *McLain v. Lance*, 146 F. 2d 341 (CA-5, 1944), as well as the Court of Appeals for the Ninth Circuit, in the case of *H. J. Heinz Co. v. Owens*, 189 F. 2d 505 (CA-9, 1951), and the Court of Appeals for the Second Circuit, in the case of *National Cancer Hospital of America v. Webster*, 251 F. 2d 466 (CA-2, 1958), have held that the Federal District Courts are without jurisdiction to redeclare, review, or set aside a judgment of the state court, whether interlocutory or final, because the Federal District Courts are *not* courts of review for either state or federal cases.

In *McLain v. Lance*, *supra*, the Fifth Circuit Court of Appeals held:

> "Where a State Court, having jurisdiction in a suit between the same parties over the same subject matter, has defined and declared the rights of the parties, the federal District Court, acting as a court of admiralty or otherwise, is without power to redeclare, review, or set aside such judgment or decree of the state court whether it be interlocutory or final, because it is not a court of review for either state or federal cases.
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> * * * *
>
> "It appears here that what the libellants need is not so much a declaration of their rights as a different declaration thereof." 146 F. 2d 341, 345-46 (CA-5, 1944).

Judge Learned Hand of the Court of Appeals for the Second Circuit cited with approval the holdings of *McLain v. Lance, supra*, in *National Cancer Hospital of America v. Webster, supra*, and stated:

> "These issues of law are open for decision in the state action, and the complaint at bar is no more than an effort to use the District Court to review decisions already made by the state court, or to substitute that court for the state court in the decision of such issues as it had not decided." 251 F. 2d 466, 467-68 (CA-2, 1958).

Any use of the Federal Declaratory Judgments Act to reexamine issues decided in a state court action between the same parties is abortive of its purpose. Judge Hastie (sitting by special designation in the Court of Appeals for the Ninth Circuit) rendered the following holding in *H. J. Heinz Co. v. Owens, supra:*

"Other courts have similarly emphasized the perversion of the purpose of declaratory judgment legislation which occurs when it is used to anticipate the result of litigation pending in another forum or to re-examine what has there been decided. *Aetna Casualty & Surety Co. v. Quarles*, 4 Cir., 137 [sic], 92 F. 2d 321; *Back's Guardian v. Bardo*, 1930, 234 Ky. 211, 27 S. W. 2d 960; *State ex rel Baird v. Board of Commissioners*, 1924, 117 Kan. 151, 230 P. 531.

* * * * *

"The strong and consistently recognized national policy to avoid such needless conflict or friction between state and federal courts underlies and finds legislative expression in Section 2283 of Title 28, discussed above. It is true that this statutory denial of power to interfere with a state proceeding by injunction is not an express mandate to refrain from interference under the same circumstances by a less drastic declaration of rights. But, at least, this statute and the policy underlying it afford sound basis for a judicial conclusion that the granting of such declaratory relief would constitute an abuse of discretion." 189 F. 2d 505, 508-09 (CA-9, 1951).

The decision of the Court of Appeals in the instant case is in direct conflict with the above decisions, since it is a mandate to the Federal District Court below to entertain the Telephone Company's declaratory judgment action which clearly seeks re-determination of an issue already

decided in the State Court proceeding. Consequently, the decision, as it now stands, not only constitutes a departure from the proper function of the Federal Judiciary, but also represents a cause of embarrassment to the State Court proceedings,[9] because the action brought by the Telephone Company seeks a re-examination of the orders and proceedings of the State Courts by the Federal District Court sitting in the State. If the decision of the Court of Appeals in the instant case is correct, it clothes the Federal District Court with appellate powers over state court cases — draped with the mantle of the declaratory judgment.

In view of the strong national policy to avoid needless conflict or friction between state and federal courts, as noted in *H. J. Heinz Co. v. Owens*, *supra*, the conflict between the state and federal courts in the instant case sparks a vital question of national importance for this Court's consideration under its supervisory powers.

III.

The decision of the Court of Appeals in the instant case is in basic disagreement with the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938), as it fails to give the same recognition and effect to the State Court judgment that the State Courts would give it.

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[9]An indication of such embarrassment is already evident in a pleading filed by the Telephone Company recently on April 8, 1963, in the State Court proceedings. This pleading obviously seeks to interpose, for the purpose of abating the litigation between the parties in the State Court proceedings, the decision and mandate of the Court of Appeals (which has been stayed). Pertinent parts of this pleading are printed in Appendix, G, *infra*, pp. 41-46.

Under the law of Louisiana, the State Court judgment holding against the Telephone Company on the issue of arbitration is the law of the case and is binding on the parties in all subsequent proceedings unless and until it is reversed by the Louisiana State Supreme Court. See, *Louisiana State Bar Ass'n. v. Theard*, 225 La. 98, 72 So. 2d 310 (1954); *Keller v. Thompson*, 134 So. 2d 395 (La. App., 1961).

The Louisiana State Supreme Court has already refused to reverse the law of the case pronounced by the State District Court and Court of Appeal. The law of the case as established in any given controversy pending in the state courts must be accorded full faith and credit in the federal courts under the *Erie-Tompkins* doctrine, unless and until the law of the case is reversed and changed by the State Supreme Court. The federal courts can not speculate whether there will be a change in the law of the case as established by the state court until such a change does in fact occur; to believe that such a change will occur in the present case is rank conjecture. See, *Moore v. Illinois Central R. Co.*, 312 U. S. 630 (1941). This Court, in applying that principle in *Stoner v. New York Life Insurance Co.*, 311 U. S. 461, 467 (1941), stated as follows:

> "We are of opinion that the Circuit Court of Appeals erred in failing to follow the two decisions of the Kansas City Court of Appeals in earlier suits between the same parties involving the same issues of law and fact.
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> "We have recently held that in cases where jurisdiction rests on diversity of citizenship, federal

courts, under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently. *West v. American Telephone & Telegraph Co. ante*, p. 223, *Fidelity Union Trust Co. et al. v. Field, ante*, p. 169, *Six Companies of California et al. v. Joint Highway District, ante*, p. 180. In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties, and the highest court of the state has refused review. *West v. American Telephone & Telegraph Co., supra.*"

The glaring conflict between the decision of the Court of Appeals in the instant case and the *Stoner* case, *supra*, can only result in an anomaly in the proper function of the Federal Judiciary in diversity cases. The decision, if permitted to stand, is in effect a mandate to the Federal District Court below to disregard the law of the case (regarding the issue of arbitration) as established by the State Court judgment. The Federal District Court below, recognizing the unsoundness of this very proposition, declined jurisdiction in favor of the principles of comity required by Federal Courts sitting in the State. By reversing the ruling of the District Court, the Court of Appeals has raised a vital question as to the proper function of the Federal Judiciary throughout the United States, and clarification by this Court is needed.

IV.

The decision of the Court of Appeals in the instant case

is in direct conflict with this Court's decision in *Angel v. Bullington*, 330 U. S. 183 (1947), as it fails to apply the doctrine of *res judicata* which precludes the Telephone Company from making a collateral attack on the State Court judgment rendered on the same issue that the Telephone Company now raises in the Federal District Court below. In its decision the Court of Appeals holds that estoppel is not before it, apparently placing significance on the fact that there has been no adjudication on the "merits" of the controversy which is pending between the parties in the State Court proceedings. (See footnote 9 of the opinion dated October 30, 1960, printed at Appendix A, *infra*, pp. 22, 26.)

This Court has held that the doctrine of *res judicata*, or more properly "estoppel by judgment," is clearly applicable even though there is no final adjudication on the merits by the state court, where the merits of that portion of the issues sought to be relitigated have already been adjudicated. This Court, in the case of *Angel v. Bullington*, 330 U. S. 183 at 190 (1947) stated as follows:

> "It is suggested that the North Carolina Supreme Court did not adjudicate the 'merits' of the controversy. It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in a sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State. Such a situation is presented when the first decision is based not on the ground that the distribution of

> judicial power among the various courts of the State requires the suit to be brought in another court in the State, but on the inaccessibility of all the courts of the State to such litigation. And that is the essence of the present case. The only issue in controversy in the first North Carolina litigation was whether or not all the courts of North Carolina were closed to that litigation. The merits of that issue were adjudicated. And that was the issue raised in the second litigation in North Carolina—that in the federal district court. The merits of this issue having been adjudicated, they cannot be relitigated."

The decision of the Court of Appeals in the instant case is in conflict with the holding of *Angel v. Bullington*, *supra*, dealing with the judicial policy against relitigation in the federal courts of issues which have already been adjudicated by the state courts.

CONCLUSION

It appearing that the holdings of the Court of Appeals for the Fifth Circuit in the instant case are clearly in conflict with decisions of various other Circuit Courts of Appeal, and this Honorable Court, as well as another panel of the Court of Appeals for the same circuit, and it further appearing that these conflicts are of great import to the understanding and proper administration of the Federal Declaratory Judgments Act and Rule 57 of the Federal Rules of Civil Procedure and the proper function of the Federal Judiciary, petitioner respectfully submits that this

Court should grant certiorari to review the judgment of the court below.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19428

SOUTHERN BELL TELEPHONE &
TELEGRAPH COMPANY,
Appellant,

versus

LOUISIANA POWER & LIGHT COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(October 30, 1962)

Before CAMERON, JONES and GEWIN, Circuit Judges.

CAMERON, Circuit Judge: The question before us here is whether the lower court erred in dismissing on the pleadings appellant's complaint praying for a declaratory judgment and injunction, and in giving judgment for appellee. The basis of the dismissal was that "the policy against relitigation of issues and the principles of comity" coun-

seled restraint in halting "state court proceedings" to "enforce a questionable federal right to arbitration."

Appellant Southern Bell Telephone and Telegraph Company (hereinafter referred to as Telephone Company) is a New York corporation and appellee Louisiana Power and Light Company (hereinaffer referred to as Power Company) is a Florida corporation. Jurisdiction was invoked under the Federal Arbitration Act[1] and on the ground that the parties are citizens of different states[2] and that the amount in controversy exceeds $10,000.00.[3]

Telephone Company and Power Company have, since 1929, operated under an agremeent for the joint use of utility poles in Louisiana. This agreement contains indemnity provisions and an arbitration provision, and the real bone of contention between the parties is whether the indemnity provisions in the agreement are to be governed by the arbitration provision set out therein. However, that issue of substantive law is not before us now.

One of Telephone Company's employees was electrocuted while working on a jointly used pole. Telephone Company discharged its legal obligations under the Louisiana Workmen's Compensation Act. The deceased employee's wife, individually and as executrix for his minor children, brought a tort suit against Power Company in a Louisiana State Court. Power Company answered and incorporated a third party petition naming Telephone Company as a third-party defendant, alleging that Telephone Company

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[1] 9 USCA §§ 1, et seq.
[2] 28 USCA § 1332.
[3] 28 USCA § 1331.

and the employee were negligent and that Power Company was not negligent and that, therefore, if judgment should be rendered against Power Company, the Power Company be given judgment over against Telephone Company under the indemnity provision[4] of the joint use agrement.

Telephone Company took and still urges the position that any indemnity liability as between the two parties to the agreement should be determined by arbitration in accordance with that provision[5] of the agreement. Telephone Company's exceptions to the third-party petition in the state court were overruled and it sought a stay of the third-party action under the provisions of the Louisiana Arbitration Act,[6] but the state court refused to grant the stay. That ruling was affirmed by the Louisiana Court of Appeals and the Louisiana Supreme Court refused certiorari on the ground that Telephone Company would have a remedy by appeal in the event of an adverse judgment on the merits. Rights under the Federal Arbitration Act were not pressed in the state court proceedings.

Telephone Company then filed this action in the United States District Court for the Eastern District of Louisiana, praying for a declaratory judgment and preliminary and

---

[4]The pertinent provision is:

"Each party shall indemnify and hold the other party harmless from all damages for such injuries to the former's employees or the former's own property that are caused by the negligence of both parties hereto or that are not shown to have been caused by the sole negligence of the other party."

[5]"When differences arise in connection with the administration of this agreement, which cannot amicably be settled by the parties hereto, such questions shall be submitted for determination to a Board of Arbitrators to be selected as follows: [A method of selection is set out.]"

[6]La. Rev. Stat. 9:4201 et seq.

permanent injunctions establishing and enforcing their claimed right to arbitration. The state court suit, as far as we are advised, has not yet reached a final hearing on the merits and it may be that it will be decided by that court that the heirs and representatives of Telephone Company's employee are not entitled to recover from Power Company. In that event Power Company and Telephone Company will have no controversy to arbitrate.

The District Court here dismissed the complaint before us, saying (1) it was doubtful whether the Arbitration Act was applicable,[7] (2) but if it was, state courts could enforce federal rights, and (3) "the policy against relitigation of issues and principles of comity" counseled restraint in halting "state court proceedings" to "enforce a questionable federal right."

In our opinion, the complaint of appellant Telephone Company states a claim upon which relief can be granted. We think that it is further plain that the pendency of a state court suit involving the same subject matter does not in any way interfere with the right of the federal court to proceed. *Kline v. Burke Const. Co.*, 1922, 260 U. S. 226; *Glen Oaks Utilities, Inc. v. City of Houston*, 5 Cir., 1960, 280 F. 2d 330. And cf. *Magnolia Textiles, Inc. et al. v. Gillis et al.*, S. Ct. Miss., 1949, 41 So. 2d 6, and *Niehaus et al. v. Magnolia Textiles, Inc.*, 5 Cir., 1949, 175 F. 2d 977, where suits involving identical issues and subject matter were litigated simultaneously to final judgments in State and

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[7] Relief depends on whether the agreement to arbitrate is "a written provision in any contract evidencing a transaction involving commerce."

Federal Courts. The doctrine of abstention[8] is not involved because no question of the construction of state law is involved here. It follows, therefore, that the final judgment on the pleadings in favor of appellee Louisiana Power Company was erroneous.[9]

"If the court below was precluded by 28 U.S.C.A. § 2283 from issuing an injunction staying the state proceedings (which we do not decide — nor do we intimate that the plaintiffs in the state court suit should be held out of any relief to which they may be entitled while their adversaries litigate their private controversy), dismissal was not the remedy. Telephone Company has the right to a decision on the declaratory judgment issue and is entitled to pursue that right in the forum of its choice. Nor is the state court fettered in proceeding to a disposition of the issues presented in the case before it.

Estoppel and the other points argued by the parties are not now before us. The judgment of the court below is reversed and the cause remanded for further proceedings consistent with this opinion.

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[8] See Empire Pictures Distributing Company v. City of Fort Worth, 5 Cir., 1960, 273 F. 2d 529, for a review of the cases.

[9] Fremont Cake and Meal Co. v. Wilson & Co., 8 Cir., 1950, 183 F. 2d 57, and Manufacturers Record Publishing Co. v. Lauer, 5 Cir., 1959, 268 F. 2d 187, are not in point. In each of those cases the state court actions had proceeded to final judgment before action was brought in federal courts.

APPENDIX B

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF LOUISIANA

NO. 11796 DIVISION DOCKET

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

versus

LOUISIANA POWER & LIGHT COMPANY

This cause came on for hearing on a former day on motion of plaintiff for preliminary injunction, and on motion of plaintiff for preliminary injunction, and on motion of defendant to dismiss. The court, having heard the argument of counsel and studied the briefs submitted in support thereof, is now ready to rule.

IT IS ORDERED that defendant's motion to dismiss be, and the same is hereby, GRANTED.

REASONS

Since one of the parties to the contract in suit does no interstate business and the subject matter of the agreemen is the joint use of utility poles located only in Louisiana, a serious doubt arises whether the Federal Arbitration Act is applicable. See 9 U.S.C. §§ 1, 2; *Bernhardt v. Polygraphic Co.*, 350 U. S. 198. If that statute is not in-

volved, there is no pretext for the intrusion of a federal court which, under the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64, and *Guaranty Trust v. York*, 326 U. S. 99, must follow the decisions of the state courts on the arbitration issue, *Bernhardt v. Polygraphic Co., supra*, and, in the absence of such decisions, should abstain. See *Leiter Minerals, Inc. v. United States*, 352 U. S. 220; *Louisiana P. & L. Co. v. Thibodaux City*, 360 U. S. 25.

Nor is the case for intervention by this court much better if the Federal Arbitration Act governs the issue tendered. For state courts are equally bound to enforce the federal right when it is operative, see *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 2 Cir., 271 F. 2d 402, 407, cert. granted, 362 U. S. 909, dismissed by stipulation, 364 U. S. 801; *Metro Industrial Painting Corp. v. Terminal Const. Co.*, 2 Cir., 287 F. 2d 382, 386 (concurring opinion of Lumbard, C. J.), and the applicant here cannot be heard to complain because he neglected to plead the Act in the proceedings pending there.

In any event, even if there is no absolute bar to the present action, see *Rooker v. Fidelity Trust Co.*, 263 U. S. 413; *Clothing Workers v. Richman Bros.*, 348 U. S. 511; 28 U.S.C. § 2283, the policy against relitigation of issues and principles of comity strongly counsel restraint in the exercise of a discretionary jurisdiction, invoked so late, to halt state court proceedings in order to enforce a questionable federal right to arbitration. See *Fremont Cake & Meal Co. v. Wilson & Co.*, 8 Cir., 183 F. 2d 57, 59-60; see also, *Manufacturers Record Publishing Company v. Lauer*, E. D. La. 169 F. Supp. 234, affirmed, 5 Cir., 268 F. 2d 187.

[By Judge J. Skelly Wright]

APPENDIX C

Act of June 5, 1948, c. 646, 62 Stat. 964, as amended, 28 U.S.C. § 2201:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Act of June 25, 1948, c. 646, 62 Stat. 964, 28 U.S.C. § 2202:

> "Further necessary or proper relief based on a declaratory judgment or decree may be granted after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Rule 57 of the Federal Rules of Civil Procedure:

> "The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declara-

tory judgment and may advance it on the calendar. As amended Dec. 29, 1948, effective Oct. 20, 1949."

Act of June 25, 1948, c. 646, 62 Stat. 968, 28 U.S.C. § 2283:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Act of July 30, 1947, c. 392, 61 Stat. 669, 9 U.S.C. § 1:

"'Maritime transactions', as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage supplies furnished vessels or repairs to vessels collisions or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any

other class of workers engaged in foreign or interstate commerce."

Act of July 30, 1947, c. 392, 61 Stat. 669, 9 U.S.C. § 2:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Act of July 30, 1947, c. 392, 61 Stat. 669, 9 U.S.C. § 3:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Act of July 30, 1947, c. 392, 61 Stat. 669, as amended, by Act of Sept. 3, 1954, c. 1263, 68 Stat. 1233, 9 U.S.C. § 4:

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party

alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

APPENDIX D

"Exhibit 1"

AN AGREEMENT FOR JOINT USE OF POLES

This Agreement, made this 2nd day of January, 1929, by and between the Louisiana Power and Light Company, a corporation of the State of Florida, hereinafter called the "Electric Company", party of the first part, and the Southern Bell Telephone and Telegraph Company, Incorporated, a corporation of the State of New York, hereinafter called the "Telephone Company", party of the second part.

* * * *

ARTICLE II

SCOPE OF AGREEMENT

This agreement shall be in effect in the following described territory State of Louisiana and shall cover all wood poles of each of the parties now existing or hereafter erected in the above territory when said poles are brought hereunder in accordance with the procedure hereinafter provided.

* * * *

ARTICLE XIII

LIABILITY AND DAMAGES

Whenever any liability is incurred by either or both of the parties hereto for damages for injuries to the employees or for injury to the property of either party, or for injuries to other persons or their property, arising out of the joint use of poles under this agreement, or due to the proximity of the wires and fixtures of the parties hereto attached to the jointly used poles covered by this agreement, the liability for such damages, as between the parties hereto, shall be as follows:

* * * *

2. Each party shall indemnify and hold the other party harmless for all damages for such injuries to the former's employees or the former's own property that are caused by the negligence of both parties hereto or that are not shown to have been caused by the sole negligence of the other party.

* * * *

ARTICLE XVIII

ARBITRATION

When differences arise in connection with the administration of this agreement, which cannot amicably be settled by the parties hereto, such questions shall be submitted for determination to a Board of Arbitrators to be selected as follows: [A method of selection is set out.] * * * *

APPENDIX E

Louisiana Revised Statutes of 1950:

Titles 9, § 4201:

> "A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Title 9, § 4202:

> "If any suit or proceedings be brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which suit is pending, upon being satisfied that the issue involved in the suit or proceedings is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until an arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with the arbitration."

Title 9, § 4203:

"The party aggrieved by the alleged failure or refusal of another to perform under a written agreement for arbitration, may petition any court of record having jurisdiction of the parties, or of the property, for an order directing that the arbitration proceed in the manner provided for in the agreement. Five days' written notice of the application shall be served upon the party in default. Service shall be made in the manner provided by law for the service of a summons.

"The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, the court shall issue an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the arbitration agreement or the failure or refusal to perform is an issue, the court shall proceed summarily to the trial thereof.

"If no jury trial is demanded, the court shall hear and determine the issue. Where such an issue is raised, either party may, on or before the return day of the notice of application, demand a jury trial of the issue, and upon such demand the court shall issue an order referring the issue or issues to a jury called and empanelled in the manner provided by law.

"If the jury finds that no agreement in writing

for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall issue and order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

APPENDIX F

"EXHIBIT A"

22ND JUDICIAL DISTRICT COURT
PARISH OF WASHINGTON
STATE OF LOUISIANA

MRS. GRACE DENNEY CORKERN, ET AL.

versus No. 19,909

LOUISIANA POWER & LIGHT COMPANY.

REASONS FOR JUDGMENT

* * * *

The above disposes of all of the exceptions which have been filed herein by Southern Bell [Southern Bell Telephone & Telegraph Company]. However, I know from the lengthy and the detailed briefs filed herein by both parties that the arbitration feature of the indemnity agreement is the major bone of contention as between the parties hereto. While I do not believe that this is properly before the Court on the exceptions which have been filed, in order to avoid unnecessary pleadings, let me say that the provisions of Article 13 of the joint use agreement, which is in evidence in the case, actually creates a substantive right in favor of Louisiana Power [Louisiana Power & Light Company], in this case. Article 18 deals only with the administration of the agreement, which is of course procedural by nature. The Code of Civil Procedure

makes it clear that it is the mission of the Courts of this State to avoid a multiplicity of litigation whenever possible. The simplest way to dispose of this matter is to have all parties before the Court who might possibly have any liability as a result of the death of the late Dudley Coleman Corkern.

Accordingly, I will sign, when presented to me, a judgment in favor of Louisiana Power and against Southern Bell dismissing the exceptions herein filed and granting Southern Bell fifteen days within which to file answers herein.

Reasons for judgment read, rendered and signed this 31st day of July, 1961.

s Frederick S. Ellis
[District Judge]

APPENDIX G

22ND JUDICIAL DISTRICT COURT
PARISH OF WASHINGTON
STATE OF LOUISIANA

MRS. GRACE DENNEY CORKERN INDIVIDUALLY AND AS TUTRIX OF AND FOR AND ON BEHALF OF THE MINORS, LINDA GRACE CORKERN AND PAUL NELSON CORKERN.

Plaintiffs.

versus No. 19,909

LOUISIANA POWER & LIGHT COMPANY.
Defendant and Third Party Plaintiff.

versus

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.
Third Party Defendant.

PETITION FOR SEVERANCE

The petition of Southern Bell Telephone and Telegraph Company, appearing through undersigned counsel, with respect shows that:

* * * *

V.

On December 8, 1961, the Telephone Company brought an action against the Power Company in the United States District Court for the Eastern District of Louisiana, which action is numbered 11,796. A copy of the Telephone Company's complaint is attached hereto, as Exhibit #1.

As shown in the complaint, the Telephone Company alleged that Article XVIII of its Joint Use Agreement with the Power Company (hereinafter sometimes referred to as the Arbitration provision) is an agreement whereby the parties established arbitration as the exclusive forum in which any dispute between the parties as to liability under the indemnity provision (Article XIII) will be finally and definitely decided. The complaint further alleged that the Telephone Company was an interstate carrier, subject to the jurisdiction of the Federal Communications Commission and the Power Company was also engaged in interstate commerce and, therefore, said Joint Use Agreement was a contract evidencing a transaction in interstate commerce. It was also alleged that the agreement to arbitrate creates a substantive federal right, enforceable under the Federal Arbitration Act (61 Stat. 669; 9 U.S.C. § 1, et seq.) and the Telephone Company would be denied this substantive right protected by Federal law if it was forced to submit to trial in this Honorable Court the question of its liability to the Power Company.

In its complaint the Telephone Company prayed for a declaratory judgment that any asserted claim by the Power Company for indemnity which may arise under the said Joint Use Agreement is arbitrable under Article XVIII of

said agreement, and, therefore, Power Company must submit to a Board of Arbitrators for a final and definite decision any claim which may be based on any judgment against the Power Company entered in this cause.

The Telephone Company also prayed incident to the main declaratory judgment action that Power Company be restrained and enjoined from any further prosecution of its third party complaint against the Telephone Company in this cause.

VI.

The Telephone Company further shows that on January 11, 1962, its action against the Power Company was dismissed by the Federal District Court and that on appeal by the Telephone Company, to the United States Court of Appeals for the Fifth Circuit, the decision of the District Court was reversed and remanded. A copy of the opinion by Judge Cameron is attached hereto as Exhibit #2 and is reported in 309 Fed. 2d 181.

In this opinion it is stated:

> "In our opinion, the complaint of appellant Telephone Company states a claim upon which relief can be granted. We think that it is further plain that the pendency of a state court suit involving the same subject matter does not in any way interfere with the right of the federal court to proceed. * * *"
> (Page 4, Ex. 2).

"If the court below was precluded by 28 U.S.C.A. § 2283 from issuing an injunction staying the state proceedings (Which we do not decide — nor do we intimate that the plaintiffs in the state court suit should be held out of any relief to which they may be entitled while their adversaries litigate their private controversy), dismissal was not the remedy. *Telephone Company has the right to a decision on the declaratory judgment issue and is entitled to pursue that right in the forum of its choice.* * * *" [Emphasis added.] (Page 5, Ex. 2)

* * * *

IX

The Telephone Company further shows that in cases where the Federal Arbitration Act applies, Federal decisions as to interpretation, applicability and enforceability control the rights of the parties to the exclusion of any state law on the subject and thus, if the Federal Arbitration Act applies, Federal authority would control and all state authorities previously cited in the instant action would no longer be pertinent. The forcing of Telephone Company to trial in the State Court would itself deprive said Company of a federally protected substantive right. By granting Telephone Company's petition this Court would preserve the issue involved in the Federal Court suit for adjudication by that Court, but by refusing Telephone Company's petition the Court will in effect be prejudging the Federal issue to the irreparable harm of Telephone Company.

* * * *

XIII

It has been the long-standing practice of Federal Courts, for reasons of comity and respect, for state courts to stay the trial of Federal issues until state issues which may make unnecessary a decision of the Federal issues have been decided by the appropriate state court. Telephone Company's petition seeks to invoke a reciprocation of this policy. If the Federal Arbitration Act applies, and that will finally be determined in the Federal Court case, then the Power Company must proceed against Telephone Company by arbitration. This Court, we submit, should permit no action which might frustrate the judgment of a federal court on a *federal issue*.

* * * *

WHEREFORE, Telephone Company prays that this Honorable Court grant a severance, all as prayed for herein severing the third party petition and action from the principal action herein.

Further, for all necessary orders and decrees and for full general and equitable relief.

s Maurice J. Naquin, Jr.
Maurice J. Naquin, Jr.
1245 Hurt Building
Atlanta, Georgia

RICHARDSON & GALLASPY
335 Austin Street
Bogalusa, Louisiana
By /s/ John N. Gallaspy
John N. Gallaspy

Attorneys of Record for
Southern Bell Telephone
and Telegraph Company

CERTIFICATE

I certify that a copy of the foregoing Petition for Severance has this date been served upon each of the opposing counsel of record by mailing a said copy, with proper postage affixed, addressed as follows:

1. Honorable Welton O. Seal, Attorney at Law, 319 Memphis Street, Bogalusa, Louisiana.

2. Honorable Andrew P. Carter, Attorney at Law, 1424 Whitney Building, New Orleans 12, Louisiana.

Bogalusa, Louisiana; April 8th, 1963.

/s John N. Gallaspy
John N. Gallaspy

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 1042.

LOUISIANA POWER & LIGHT COMPANY,
Petitioner,

versus

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari.

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St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 1042.

LOUISIANA POWER & LIGHT COMPANY,
Petitioner,

versus

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW.

The Court of Appeals' opinion is reported at 309 F. (2d) 181 and is set forth in Petitioner's Appendix A, pp. 22-26. The opinion of the District Court, which is unreported, is set forth in Petitioner's Appendix B, pp. 27-29.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

The sole question presented is whether a federal district court, which has jurisdiction of the parties, should nevertheless refuse to adjudicate the rights and obligations of the parties under an agreement within the purview of the Federal Arbitration Act simply because of the pendency in a state court of another suit between the parties in which such federal question has never been raised or decided.

Stated another way, the Petitioner seeks to have reviewed an interlocutory decision of the Court of Appeals holding that the District Court, which otherwise had jurisdiction, should declare the rights of the parties under the Federal Arbitration Act, and that a determination of such rights should not be relegated to a state court.

STATUTES INVOLVED.

The statutory provisions involved are set forth in the Petition.

STATEMENT OF THE CASE

The only facts which were before either of the two courts below are those set out in Respondent's Complaint filed in the District Court (R. 2-15). The Complaint was dismissed on the pleadings and all facts alleged must be accepted as true.

The Complaint alleged diversity of citizenship between the parties and the jurisdictional amount.

The matters which transpired before the filing of the Complaint in the District Court are succinctly stated in the opinion of the Court of Appeals, as follows:

> "Telephone Company and Power Company have, since 1929, operated under an agreement for the joint use of utility poles in Louisiana. This agreement contains indemnity provisions and an arbitration provision, and the real bone of contention between the parties is whether the indemnity provisions in the agreement are to be governed by the arbitration provision set out therein. However, that issue of substantive law is not before us now.
>
> One of the Telephone Company's employees was electrocuted while working on a jointly used pole. Telephone Company discharged its legal obligations under the Louisiana Workmen's Compensation Act. The deceased employee's wife, individually, and as executrix for his minor children, brought a tort suit against Power Company in a Louisiana State Court. Power Company answered and incorporated a third party petition naming Telephone Company as a third party defendant, alleging that Telephone Company and the employee were negligent and that Power Company was not negligent and that, therefore, if judgment should be rendered against Power Company, the

Power Company be given judgment over against Telephone Company under the indemnity provision[4] of the joint use agreement.

Telephone Company took and still urges the position that any indemnity liability as between the two parties to the agreement should be determined by arbitration in accordance with that provision[5] of the agreement. Telephone Company's exceptions to the third-party petition in the state court were overruled and it sought a stay of the third-party action under the provisions of the Louisiana Arbitration Act,[6] but the state court refused to grant the stay. That ruling was affirmed by the Louisiana Court of Appeals and the Louisiana Supreme Court refused certiorari on the ground that Telephone Company would have a remedy by appeal in the event of an adverse judgment on the merits. Rights under the Federal Arbitration Act were not pressed in the state court proceedings."

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[4] The pertinent provision is:

"Each party shall indemnify and hold the other party harmless from all damages for such injuries to the former's employees or the former's own property that are caused by the negligence of both parties hereto or that are not shown to have been caused by the sole negligence of the other party."

[5] "When differences arise in connection with the administration of this agreement, which cannot amicably be settled by the parties hereto, such questions shall be submitted for determination to a Board of Arbitrators to be selected as follows." [A method of selection is set out.]"

[6] La. Rev. Stat. 9:4201 et seq.

Respondent's Complaint also alleged detailed facts describing the interstate character of both companies'[1] operations and specifically alleged that the more than 50,000 poles covered by the joint use agreement are used in the

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[1] Pertinent parts of the Respondent's Complaint are printed in Appendix A, *infra*, pp. 21-22.

carrying on of interstate commerce and, indeed, constitute an integral part of instrumentalities of interstate commerce.[2]

In granting Petitioner's motion to dismiss (see Appendix B of Petition, pp. 27-29), the District Court below assigned three reasons which were summarized by the Court of Appeals (Appendix A to Petition, p. 25) as follows:

> "The District Court here dismissed the complaint before us, saying (1) it was doubtful whether the Arbitration Act was applicable, (2) but if it was state courts could enforce federal rights, and (3) 'the policy against relitigation of issues and principles of comity' counseled restraint in halting 'state court proceedings' to 'enforce a questionable federal right.'"

The Court of Appeals held that the action of the District Court in dismissing Respondent's Complaint was error and the cause was remanded for further proceedings consistent with the Court's opinion.

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[2] A contract of this character is clearly one evidencing a transaction in commerce:

Metro Industrial Painting Corp. v. Terminal Construction Co., 287 F. (2d) 382 (CA-2), Cert. denied 368 U. S. 817;
Texas Eastern Transmission Corp. v. Barnard, 177 F. Supp. 123 (reversed on other grounds, 285 F. (2d) 536 (CA-6));
National Labor Relations Board v. J. G. Boswell Co., 136 F. (2d) 585;
Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197; Cf *Bernhardt v. Polygraphic Co.*, 350 U. S. 198

ARGUMENT.

I.

The Order of the Court of Appeals Being Interlocutory, the Discretionary Writ of Certiorari Should Be Denied.

We recognize that the Court has full power to review by writs of certiorari interlocutory orders of lower federal courts as well as those which are final. However, as has many times been stated by this Court, the use of the writ to review interlocutory orders is sparingly used:

Denver v. N. Y. Trust Co., 229 U. S. 123, 133;
American Construction Co. v. Jacksonville T. & K. W. R. Co., 148 U. S. 372, 384.

In **Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.**, 240 U. S. 251, 258, the Court said:

> "* * * The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application: * * *"

The reason for the Court's reluctance to review interlocutory orders by certiorari was well expressed in **United States v. Beatty**, 232 U. S. 463, 468, wherein it was said:

> "* * * Interlocutory rulings not infrequently become of no importance by reason of the final result or of intervening matters, and that may be true here. * * *"

There has been no trial of the factual issues tendered by the Respondent's Complaint and, in fact, no answer has been filed by Petitioner in response to the allegations of the Complaint. The course of the trial of such issues

may possibly change the character of the case. Also, as the Court of Appeals pointed out in its opinion:

> "* * * The state court suit, as far as we are advised, has not yet reached a final hearing on the merits and it may be that it will be decided by that court that the heirs and representatives of Telephone Company's employee are not entitled to recover from Power Company. In that event Power Company and Telephone Company will have no controversy to arbitrate" (Appendix A to Petition, p. 25).

This Court, in **SS Monrosa v. Carbon Black Export**, 359 U. S. 180, 184, pointed out the danger of deciding issues posed abstractly, saying:

> "* * * Examination of a case on the merits, on oral argument, may bring into 'proper focus' a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improvident. See Rice v. Sioux City Memorial Park Cemetery, Inc., supra (349 U. S. at 73). While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly."

Furthermore, the Petitioner would not be prejudiced if the writ of certiorari is denied in this case. If, after trial, a judgment should be entered against Petitioner, it would have an opportunity for review of the questions it seeks to raise at this time:

Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 418;

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 258;

Panama Railroad Co. v. Napier Shipping Co., 166 U. S. 280, 284.

II.

No Conflict of Decisions Exists.

The Petition asserts that the decision of the Court of Appeals conflicts with certain decisions of this Court, namely: **Utah v. Wycoff Co.**, 344 U. S. 237; **Stoner v. New York Life Insurance Company**, 311 U. S. 461, and **Angel v. Bullington**, 330 U. S. 183.

In support of this claimed conflict, Petitioner tears from context certain quotations from the above mentioned decisions. However, when the facts and the actual decision in the cases are considered, it becomes clear that they are completely inapposite.

The **Wycoff** case is discussed on pages 10 and 11 of the Petition. In that case, a suit was brought in a federal district court seeking a declaration that the company was engaged solely in interstate commerce, and that hence it was immune from regulation by the Public Service Commission of Utah. In the opinion of the court the record did not disclose that there were any presently existing controversies between the company and the Commission. For aught that appeared, Wycoff was merely seeking under the guise of a declaratory judgment an advisory opinion which would stand it in good stead in the event the Commission should in the future apply its regulatory powers to the company. Under such circumstances, this court held that the case was not a proper one for declaratory relief. The court stated:

> "The complainant in this case does not request an adjudication that it has a right to do, or to have,

> anything in particular. It does not ask a judgment that the Commission is without power to enter any specific order or take any concrete regulatory step. It seeks simply to establish that, as presently conducted, respondent's carriage of goods between points within as well as without Utah is all interstate commerce. One naturally asks, 'So what?' To that ultimate question no answer is sought" (344 U. S. 244).

In the present case, there is a live, concrete controversy between the Petitioner and the Respondent; the Respondent asserting that any right of the Petitioner to indemnity must be determined by a Board of Arbitration and the Petitioner, on the other hand, asserting that the question of indemnity should be decided by a jury under the Petitioner's third party petition filed in the state court case.

In **Wycoff** Mr. Justice Jackson, after deciding that there was no justiciable issue, expressed doubt whether there was federal-question jurisdiction in the District Court. It is from this portion of the opinion that Petitioner quotes. But after this discussion Mr. Jusfice Jackson added:

> "Since this case should be dismissed in any event, it is not necessary to determine whether, on this record, the alleged controversy over an action that may be begun in state court would be maintainable under the head of federal-question jurisdiction . . . ." (344 U. S. 248-249).

The remarks of Justice Jackson go to the jurisdiction of the federal district court in a "federal-question" case rather than the discretion to be exercised by a district court where jurisdiction exists.

The jurisdiction of the District Court in the present case did not depend on the existence of federal-question jurisdiction, the basis of the Court's jurisdiction being predicated on diversity.

The only questions involved in the **Stoner** case were state law questions. Previous to the filing of the federal court suit, there had been litigation in the state courts between the same parties. The Circuit Court of Appeals had refused to consider itself bound by decisions of the Kansas City Court of Appeals in the earlier suits. In reversing, Mr. Justice Murphy, speaking for the Court, said:

> "We are of opinion that the Circuit Court of Appeals erred in failing to follow the two decisions of the Kansas City Court of Appeals in earlier suits between **the same parties involving the same issues of law and fact**" (Emphasis added). 311 U. S. 467.

In the case now under consideration, the law involved is federal substantive law and there has been absolutely no adjudication by the state court of such law, and even if there had been, there is nothing in **Erie v. Tompkins**, 304 U. S. 64, which would compel the federal court to follow such decisions.

The last Supreme Court case relied on by Petitioner in his effort to show a conflict is this Court's opinion in **Angel v. Bullington**, supra, which is discussed on pages 18-20 of the Petition. In this case the Court applied the doctrine of *res adjudicata* under the following circumstances. Bullington, a citizen of Virginia, sold land in Virginia to Angel, a North Carolina citizen. The full purchase price was not paid and to secure the balance a deed of trust was executed. Angel defaulted and the trustee sold the land. The proceeds were applied on the unpaid balance. A suit for a deficiency judgment was filed by Bullington in a North Carolina state court. Angel, in that suit, asserted that such actions were barred by a North Carolina statute. Bullington raised in both the lower and state supreme court the question of the constitutionality of this statute under the Federal Constitution. After a final judgment by the state supreme court refusing to hold

the statute unconstitutional, no petition for certiorari was filed with this court. Later another suit was filed in the federal district court by Bullington against Angel. This court held that in view of the previous state court litigation wherein the federal question had been definitely raised, although not discussed in the state supreme court's opinion, the doctrine of *res adjudicata* barred subsequent federal court action. The court said:

> "Here, claims based on the United States Constitution were plainly and reasonably made in the North Carolina suit. The North Carolina Supreme Court met these claims" (330 U. S. 188, 189).

In the instant case, the federal right which Respondent is seeking to protect was neither raised, considered nor passed upon by any of the Louisiana state courts. Indeed, the order of the state supreme court in denying the writ of certiorari is merely interlocutory even as to the state law question, since in denying the writ, that court stated:

> "Relator has a remedy by appeal in the event of an adverse judgment on appeal" (Petition, p. 6).

In addition to the differences already pointed out between **Angel** and the instant case, Justice Frankfurter, writing the majority opinion, stated:

> "We start with the fact that the prevailing rule as to res judicata is settled law in North Carolina. An adjudication bars future litigation between the same parties not only as to all issues actually raised and decided but also as to those which could have been raised * * *" (330 U. S. 186).

In Louisana, unlike North Carolina, res judicata applies only to issues actually raised and decided and not to those which could have been raised. In **Woodcock v. Baldwin**, 110 La. 270, 275, 34 So. 440, 441, the Supreme Court of Louisiana stated:

> "The doctrine of the common law courts that *res judicata* includes not only everything pleaded in a cause, but even that which might have been pleaded, does not obtain generally under our system.
>
> Here in Louisiana the doctrine is much more restricted than in common law States. * * *"

The ruling in the **Woodcock** case has been followed time after time by the Louisiana Supreme Court. See for example the following cases:

Schlater v. Le Blanc, 121 La. 919, 924, 46 So. 921, 922;
Tennent v. Caffery, 163 La. 976, 989, 113 So. 167, 172;
Woodruff v. Producers Oil Co., 142 La. 368, 373, 76 So. 803, 804;
Quarles v. Lewis, 226 La. 76, 81, 75 So. (2d) 14, 16;
Tucker v. N. O. Laundries, Inc., 238 La. 207, 222, 114 So. (2d) 866, 872.

The Court of Appeals for the Fifth Circuit has likewise recognized that the doctrine of *res adjudicata* is applied differently in Louisiana than in common law states. See:

Union Producing Co. v. Driskell, 117 F. (2d) 229 (CA-5);
Opelousas-St. Landry Securities Co. v. United States, 66 F. (2d) 41 (CA-5);
International Paper Co. v. Maddox, 203 F. (2d) 88 (CA-5).

In addition to the claimed conflict between the decision of the court below and the Supreme Court decisions just discussed, Petitioner asserts a conflict between the Court of Appeals' opinion and the decisions of the Court of Appeals for the Second Circuit in **National Cancer Hospital of America v. Webster**, 251 F. (2d) 466 (CA-2), decisions of the Court of Appeals for the Ninth Circuit in **Shell Oil Co. v. Frusetta**, 290 F. (2d) 689 (CA-9), and **H. J. Heinz Co. v. Owens**, 189 F. (2d) 505 (CA-9), and a decision of another panel of the Circuit Court of Appeals

for the Fifth Circuit in the case of **McLain v. Lance**, 146 F. (2d) 341 (CA-5). The issues and facts involved in each of these cases show that they likewise are inapposite and do not conflict with the decision of the Court of Appeals in this case.

In the **Cancer Hospital** case the Second Circuit affirmed a judgment of the district judge dismissing a complaint for lack of jurisdiction over the subject matter. The facts were simply these: The National Cancer Hospital was a citizen of Michigan. Webster was a citizen of New York. The hospital made a contract with De Haan, Inc., under which De Haan was to collect funds in support of the hospital's activities. The State of New York filed an action in the Supreme Court of New York against the hospital, De Haan, Inc., and others to forbid any further solicitation of funds on the ground that the hospital had no certificate of authority to do business within New York. This suit came on for trial in the New York Supreme Court and during the trial the state demanded the appointment of a receiver in addition to its original demand for injunction. The state court appointed Webster as receiver and directed him to distribute all funds he collected to approved cancer organizations. On appeal to the Appellate Division of the Supreme Court the decree of the trial court was affirmed with a minor modification. The judgment as so modified was affirmed by the New York Court of Appeals. After this litigation in the state courts the declaratory judgment action was filed in the federal court. The relief demanded "was a declaratory judgment that the assets in the hands of the receiver were property of the plaintiff." There were no federal issues involved and the only issues raised in the federal court action were state issues which had either already been decided by the state court or would be decided. The court rightly decided that this was nothing more than a bald attempt to retry in federal court state issues.

Respondent, by its suit filed in the District Court below, is not attempting to retry any state law issue involved in the Louisiana state court proceedings. Respondent is asking an adjudication of the rights and obligations of the Petitioner and the Respondent under federal law, to wit, the Federal Arbitration Act.

In **Shell Oil Co. v. Frusetta**, supra, Appellant Shell and appellees, as lessee and lessors of certain oil lands, had been jointly defending claims pressed by a group of plaintiffs in the California state courts involving the title to said lands. Appellees announced in open court that they were going to seek permission to file crossbills against Shell based on alleged oral agreements as to who would pay for defending adverse claims, etc. Three days before such crossbills were filed, Shell sought a declaratory judgment, based entirely on state law, from a United States District Court on the same issues. The following statement appears in the Court's decision:

> "* * * It is agreed between the parties that the same identical issues are raised in Shell's complaint for declaratory judgment as appear in the 13 cross-complaints filed by the appellees in the state court. * * * * * * The court [United States District Court] also stated that it felt the substantive questions raised were so clearly connected with the pending state litigation that the state court was the most satisfactory forum in which to hear the matter * * *" (290 F. (2d) 691).

In the instant case, the state court certainly is no better equipped than a federal court to interpret and apply a federal statute and federal decisional law.

In **Heinz Company v. Owens**, supra, a state court had rendered a final judgment against the federal court plaintiff in favor of the federal court defendant from which

no appeal was prosecuted. Some five years after the entry of this final decree the federal court plaintiff was cited for contempt, the grounds of the citation being that he had violated the final decree of the state court. It was after these events had transpired that the federal court suit for a declaratory judgment was filed. The Court of Appeals, in affirming the District Court's dismissal of the complaint, in the last paragraph of its opinion stated:

> "All these factors considered, we conclude that the granting of injunctive relief in this case is prohibited by statute and the granting of declaratory relief would constitute a plain abuse of discretion * * *" (189 F. (2d) 509).

In the last analysis, the declaratory judgment action in the **Heinz** case was no less than an attempt to review in the federal district court the validity of a final order of a state court. A federal district court has no such appellate jurisdiction.

McLain v. Lance, supra, involved a dispute between "Houston pilots" and the "Galveston pilots" as to which group had the right to pilot "refuge vessels" in the waters of Galveston Bay. The suit was between two groups of citizens of Texas and involved the construction of Texas statutes. The courts found that these statutes had been construed and the rights of the parties determined in the state courts of Texas, including an appeal to the Supreme Court of Texas, before the unsuccessful "Houston pilots" filed their libel in personam in the federal district court. The court stated:

> "* * * and it [the United States District Court] could have and doubtless should have, refused to render a declaratory judgment in a case where the state courts of Texas, having concurrent—and maybap exclusive—jurisdiction of the same subject matter

and of the same parties, had theretofore declared the rights of the parties to pilotage over the waters involved.

Moreover, the rights of the contending parties stemmed from local statutes of the State of Texas, rather than from maritime contracts of vessels to pay for pilotage services, or because, forsooth, the Navy or Coast Guard might, or might not, in the future make some order or regulation that would affect the parties. Courts do not concern themselves to decide abstract questions" (146 F. (2d) 343).

The underlying reason why federal courts, in the exercise of discretion, refuse to entertain declaratory judgment suits, when the same issues are pending in a state court action, is because state issues may be more economically and appropriately decided by the state court. This basic reason for the exercise of such discretion is something the Petitioner completely overlooks or fails to recognize. The rule is not intended to afford federal courts an excuse to force litigants to adjudicate federal issues in state courts, particularly where such issues have not been raised or decided in state court proceedings. This is made clear by the opinion of this Court in **Brillhart v. Excess Insurance Company of America**, 316 U. S. 491, 495, wherein the court stated:

> "* * * Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, **not governed by federal law**, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." (Emphasis added.)

Other than the decision by the District Court below, Respondent can find no decision holding that a federal

court, having jurisdiction of the parties, should abdicate its authority and force a litigant to try his undecided federal law questions in a state court.

III.

The Decision Below is Clearly Correct.

Before the decision of this Court in **Bernhardt v. Polygraphic Company**, 350 U. S. 198, it was thought by many that the provisions of the Federal Arbitration Act were merely procedural. However, in **Bernhardt** this Court held that the provisions of the Act created a substantive right to arbitration whenever the contract evidences a transaction involving commerce. The Court stated:

> "* * * The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. * * *" (350 U. S. 203.)

In **Bernhardt** jurisdiction was predicated on diversity, and the court finding that the contract in question was not one involving interstate commerce, held that whether the dispute was arbitrable or not must be determined by resort to state law.

After the **Bernhardt** case the Court of Appeals for the Second Circuit decided two cases where the contracts in question did involve interstate commerce: **Robert Lawrence v. Devonshire, Inc.**, 271 F. (2d) 502 (CA-2). (Certiorari granted 362 U. S. 909; Certiorari dismissed 364 U. S. 801); and **Metro Industrial Painting Corp. v. Terminal Const. Co.**, 287 F. (2d) 382 (CA-2) (Certiorari denied, 368 U. S. 817). Both of these were diversity cases.

In each of these cases, the Court of Appeals held that in view of the substantive nature of the rights created by the Federal Arbitration Act, national law and not state

law is controlling. Judge Medina, in writing the majority opinion in **Robert Lawrence v. Devonshire, Inc.**, supra, stated:

> "* * * The opinion of Mr. Justice Douglas in Bernhardf summarizes nicely the manifold effects of such agreements. We need not belabor them here. The crucial point is that the 'nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action.' See 350 U. S. at page 203, 76 S. Ct. at page 276. Whether the bargain evidenced by the contract or agreement is or is not valid cannot differ essentially from the question of whether any other meeting of the minds of the parties will be recognized as having created certain rights. And the same may be said of the rules or principles to be evolved in connection with the construction and interpretation of the agreement (271 F. (2d) 408).
>
> * * * * * * * *
>
> "We, therefore, hold that the Arbitration Act in making agreements to arbitrate 'valid, irrevocable, and enforceable' created national substantive law clearly constitutional under the maritime and commerce powers of the Congress and that the rights thus created are to be adjudicated by the federal courts whenever such courts have subject matter jurisdiction, including diversity cases, just as the federal courts adjudicate controversies affecting other substantive rights when subject matter jurisdiction over the litigation exists. We hold that the body of law thus created is substantive not procedural in character and that it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs, since these two types of legal questions are inextricably intertwined." (271 F. (2d) 409).

In **Metro Industrial Painting Corp.**, the Court stated:

> " " " Moreover, contrary to respondents' contention, Devonshire held that federal rather than local law governs 'questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce " " " since these two types of legal questions are inextricably intertwined.' 271 F. 2d 402, at page 409. The issue of arbitrability, i. e., whether a particular dispute is covered by an arbitration clause, being a question of 'interpretation and construction,' the court below was correct in not considering state cases as being binding authority, and in determining the issue according to the 'liberal' policy recognized in Devonshire" (287 F. (2d) at 385).

The District Court, in dismissing Respondent's complaint, relied on the pendency of the state court case and the fact that Respondent could raise the federal question, i. e., the applicability of the Arbitration Act in the state court proceeding.

While it is true that such issue could be raised in the state court, Respondent had an option to present that issue for adjudication by a federal court where federal court jurisdiction otherwise exists, as it clearly does in the present case. The right of a litigant to have its substantive federal rights adjudicated by a federal court which has jurisdiction of the parties is fundamental under our federal system. See **Southern Pacific Co. v. Bogert**, 250 U. S. 483, and **Nuveen v. Board of Public Instruction**, 88 F. (2d) 475 (CA-5).

The sole issue raised by Respondent's Complaint, which was dismissed by the District Court, is the applicability of the Federal Arbitration Act to the agreement between the parties. This issue must be decided solely by resort to federal substantive law. The District Court's dismissal of

this case had the direct effect of transferring an exclusively federal issue to the state court for decision. Respondent respectfully asserts that such action was not warranted by any recognized principles of judicial discretion, comity or abstention. It was outright abdication. The decision of the Court of Appeals in reversing the action of the District Judge is clearly correct.

CONCLUSION.

For the foregoing reasons, the Petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

In the United States District Court,
Eastern District of Louisiana,
New Orleans Division.

No. 11,796.

Southern Bell Telephone and Telegraph Company,

Plaintiff,

v.

Louisiana Power and Light Company,

Defendant.

I.

This action is brought for a declaratory judgment pursuant to Title 28, U. S. C., § 2201-2202, and Rule 57, Rules of Civil Procedure, and to protect legal rights of plaintiff and the jurisdiction of this Court under the Federal Arbitration Act, 61 Stat. 669; 9 U. S. C., §1 et seq.

* * * * * * * * *

IV.

Telephone Company, a wholly-owned subsidiary of American Telephone and Telegraph Company, is an interstate carrier, subject to the jurisdiction of the Federal Communications Commission and it furnishes telephone communications to more than 4,000,000 subscribers. During the calendar year 1960, Telephone Company handled more than 10,000,000 interstate long distance calls which originated in the State of Louisiana, of which a substantial number were transmitted in part on wires or cables located on poles covered by the Joint Use Agreement described in paragraph VI below.

V.

Power Company, a wholly-owned subsidiary of Middle South Utilities, Inc., is engaged in generating, purchasing, selling and exchanging electrical energy and in distributing electrical energy to consumers in a large area in Louisiana. The area served by Power Company includes over 500 communities where it has more than 200,000 residential customers and more than 24,000 commercial and industrial customers. Power Company and Arkansas Power and Light Company, Mississippi Power and Light Company, and New Orleans Public Service, Inc., which are also subsidiaries of Middle South Utilities, Inc., have power pooling arrangements whereby all generating and transmitting facilities are combined and are operated as one coordinated or integrated system. Under this arrangement and by purchasing and selling power from other utilities, a substantial portion of the energy generated by Power Company is transmitted in interstate commerce to states other than Louisiana and a substantial portion of the energy distributed by Power Company in Louisiana is generated and transmitted in interstate commerce from other states.

. . . . . .